FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 7 1961
JAMES R. BROWNING Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1961

No. ~~1021~~ 135

MOVIECOLOR LIMITED,

Petitioner,

v.

EASTMAN KODAK COMPANY, TECHNICOLOR INC. and TECHNICOLOR MOTION PICTURE CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

COOPER, OSTRIN & DE VARCO,
HERMAN E. COOPER,
EUGENE N. SOSNOFF,
655 Madison Avenue,
New York 21, New York,
Attorneys for Petitioner.

TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
1. U. S. C. §15. Suits by persons injured; amount of recovery	3
2. 15 U. S. C. §15b. Limitations of actions	3
3. New York Civil Practice Act, Section 48(2). Actions to be commenced within six years	3
4. 28 U. S. C. §1652. State laws as rules of decision	3
5. Rule 15(a), Federal Rules of Civil Procedure. Amended and Supplemental Pleadings	4
Statement of the Case	4
Basis of Federal Jurisdiction	4
Parties	4
Complaint	5
Reason for Granting the Writ (Summarized)	8
I—Certiorari should be granted to announce standards for application of Rule 15(a)	9
II—Certiorari should be granted so that this Court can end all uncertainty as to the application of federal equitable tolling doctrine to state statutes of limitations in suits based on federal rights	13
Conclusion	16
Appendix A	17

Table of Cases.

PAGE

A. L. B. Theatre Corp. v. *Loew's Inc.*, 21 F. R. D. 584 (N. D. Ill. 584) 11

American Tobacco Co. v. *People's Tobacco Co.*, 204 F. 58 (5 Cir. 1913) 14

Archbold v. *McLaughlin*, 181 F. Supp. 175 (D. C. 1960) 11

Armstrong Cork Co. v. *Patterson-Sargent Co.*, 10 F. R. D. 534 (N. D. Ohio, E. D., 1950) 11

Bailey v. *Glover*, 88 U. S. 342, 21 Wall. 342 (1874) 9, 13, 15

Bryan v. *Austin*, 354 U. S. 933 (1957) 10

Burnham Chemical Co. v. *Borax Consolidated*, 170 F. 2d 569 (9 Cir. 1948), cert. den., 336 U. S. 924 (1949) 14

Canister Co., Inc. v. *National Can Corp.*, 6 F. R. D. 612 (Del. 1946) 12

Conley v. *Gibson*, 355 U. S. 41 9

Crummer Co. v. *DuPont*, 117 F. Supp. 870, 876 rev'd. on other grounds, 223 F. 2d 238, 148 F. Supp. 255, rev'd. on other grounds, 255 F. 2d 433 (5 Cir. 1958) 15

Dombrovskis v. *Murff*, 24 F. R. D. 302 (S. D. N. Y. 1959) 10, 11

Frank Adam Electric Co. v. *Westinghouse Elec. Mfg. Co.*, 146 F. 2d 165 (1945) 11

Gallon v. *Lloyd-Thomas Company*, 264 F. 2d 828 (8 Cir., 1959) 11

Glus v. *Brooklyn Eastern District Terminal*, 359 U. S. 231 (1959) 9

Hirshorn v. *Mine Safety Appliance Co.*, 101 F. Supp. 549 (W. D. Pa. 1951) 11

Holmberg v. *Armbrecht*, 327 U. S. 392 (1946) 13, 14, 15

Huse v. *Consolidated Freightways*, 227 F. 2d 425 (7 Cir. 1955) 10

International Ladies' Garment Workers Union v. *Donnelly Garment Co.*, 121 F. 2d 561 (8 Cir. 1941) 10

PAGE

Kerrigan's Estate v. *Joseph E. Seagram & Sons*, 199 F. 2d 694 (3 Cir. 1952) 10

Maty v. *Grasselli Chemical Co.*, 303 U. S. 197 (1938) 9

McDowall v. *Orr Felt & Blanket Co.*, 146 F. 2d 136 (6 Cir. 1944) 11

McNaughton v. *New York Central Railroad Company*, 220 F. 2d 835 (7 Cir. 1955) 11

Robbins v. *Jordan*, 181 F. 2d 793 (D. C. App. 1950) 10

Schick v. *Finch* (S. D. N. Y. 1944), 8 F. R. D. 639 ..... 11, 12

Schwartz v. *American Stores Co.*, 22 F. R. D. 38 (D. C. Pa. 1958) 12

Sukow Borax Mines Cons. v. *Borax Consolidated*, 185 F. 2d 196 (9 Cir. 1950), cert. den., 340 U. S. 943 (1951), rehearing den., 341 U. S. 912 (1951) 14

Tahir Erk v. *Glenn L. Martin Co.*, 116 F. 2d 865 (4 Cir. 1941) 10, 11

Tobacco and Allied Stocks, Inc. v. *Transamerica*, 143 F. Supp. 323 (D. Del. 1956), aff'd, 244 F. 2d 902, 903 (3 Cir. 1957) 14, 15

W. C. Sheperd Co. v. *Royal Indemnity Co.*, 192 F. 2d 710 (5 Cir. 1951) 11

Winkler Koch Engineering Co. v. *Universal Oil Products*, 100 F. Supp. 15 (S. D. N. Y. 1951) 15

STATUTES.

11 U. S. C. §29(e) 14

12 U. S. C. §812 14

15 U. S. C. §15 3

15 U. S. C. §15b 3

28 U. S. C. §1254 1

28 U. S. C. §1652 3

42 U. S. C. §1983 14

PAGE

Clayton Act,
15 U. S. C. §15 4

New York Civil Practice Act,
Section 48(2) 3, 15

Robinson-Patman Act,
15 U. S. C. §13 4

Sherman Act,
15 U. S. C. §§1 and 2 4

RULES.

Federal Rules of Civil Procedure,

Rule 12(c) 5

Rule 15 10

Rule 15(a) 2, 4, 8, 9, 10, 12

OTHER AUTHORITIES.

1A Barron and Holtzoff, *Federal Practice and Procedure* 707 10

3 *Moore's Federal Practice* 804 9

3 *Moore's Federal Practice* 828 ..... 10, 11

NOTE, *Federal Statutes Without Limitation Provisions*, 53 Col. L. R. 68 (1953) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. .....

MOVIECOLOR LIMITED,

Petitioner,

v.

EASTMAN KODAK COMPANY, TECHNICOLOR INC. and TECHNICOLOR MOTION PICTURE CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Opinions Below.

The opinion of the Court of Appeals is not yet reported and is printed herein, Appendix A, page 17. The opinion of the District Court for the Southern District of New York is unreported and is printed at pp. 6a-10a of the Record.

Jurisdiction.

The judgment of the Court of Appeals was entered on March 10, 1961 (R. 55a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

1. For the first time a Court of Appeals has consciously and articulately held that the federal equitable doctrine that a statute of limitations is tolled during the period of concealment of a wrong is applicable in an action at law based on a federal right to the borrowed time period of a state statute of limitations, even though no similar concealment doctrine exists under state law. Was it an abuse of discretion, therefore, for the Court of Appeals to foreclose petitioner from seeking leave to amend its complaint particularly where the sole ground for upholding dismissal was that the fact of fraudulent concealment was not adequately alleged?

2. Was the abuse of discretion compounded by the fact that the District Court in dismissing the complaint as a matter of law as time barred by the New York statute of limitations "assumed" that it raised "the question of fraudulent concealment" (R. 7a); the appeal was prosecuted on this basis; and no cross appeal from any part of the District Court's decision was taken?

3. Does the requisite of Rule 15(a), Federal Rules of Civil Procedure, that leave to amend "shall be freely given when justice so requires," require that plaintiff in this case be given the opportunity to amend?

4. Does the complaint in its present form sufficiently allege fraudulent concealment and does it also allege adverse domination and control of petitioner by defendants, either of which was held by the Court below to constitute sufficient ground for suspending the statute of limitations?

Statutes Involved.

The following statutes are involved in this appeal:

1. 15 U. S. C. §15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. 15 U. S. C. §15b. Limitation of actions

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

3. New York Civil Practice Act, Section 48(2). Actions to be commenced within six years

"The following actions must be commenced within six years after the cause of action has accrued:

* * * * * *

2. An action to recover upon a liability created by statute, except a penalty or forfeiture.

* * * * * *

4. 28 U. S. C. §1652. State laws as rules of decision

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall

be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

5. Rule 15(a), Federal Rules of Civil Procedure. Amended and Supplemental Pleadings

"(a) **Amendments.** A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders."

Statement of the Case.

Basis of Federal Jurisdiction.

The basis of federal jurisdiction is that this action is brought under the federal antitrust laws, *i.e.*, 15 U. S. C. §15 (Clayton Act), 15 U. S. C. §§1 and 2 (Sherman Act), 15 U. S. C. §13 (Robinson-Patman Act) (R. 12a; Par. 5)*.

Parties.

Petitioner Moviecolor Ltd. is an English corporation formed in 1929 to commercialize a method of color photography known as the Keller-Dorian process in which it had valuable license rights (R. 11a, 18a-19a; Pars. 1, 15-18).

---

* Figures to the left of semi-colon refer to pages of the record. Figures to the right refer to paragraphs of the complaint intended on those pages.

Defendant Eastman Kodak Company is an American corporation which manufactures and sells colorfilm and other photographic equipment (R. 11a; Par. 2).

Defendants Technicolor Inc. and Technicolor Motion Picture Corporation are related American corporations engaged in the color motion picture business (R. 11a-12a; Pars. 3-4).

Complaint.

Since the complaint (R. 11a-39a) was dismissed on a motion for judgment on the pleadings under Rule 12(c), F. R. C. P. (R. 6a), its fact allegations must be accepted as true, and it is otherwise entitled to every possible inference favorable to sustaining it.

The complaint charges defendants with having stunted the development of the art of color photography and deprived the world of its superior forms through an intricate international conspiracy that has enabled them to monopolize the field for over a generation. This monopoly has been achieved largely by the fraudulent suppression and destruction of the Keller-Dorian process (R. 26a-39a; Pars. 40-53).

Of the various methods of color photography competing for acceptance in or about the year 1929, by far the most efficient, most economical, and most faithful in color reproduction was the Keller-Dorian process in which standard black and white photographic techniques and equipment (including cameras) were used (R. 15a-16a, 29a, 30a-32a, 37a-38a; Pars. 11(e), 41(i) and (j), 42, 51, 53).

The technicolor process in comparison was considerably more complicated and costly, required highly specialized and prohibitively expensive equipment and other paraphernalia, and with all of that fell far below Keller-Dorian's aesthetic achievements in the medium (R. 14a-15a, 28a-29a, 30a-32a, 37a-38a; Pars. 11(a), (c), 41(e), (i), 42, 53).

Precisely for its disadvantages, however, the technicolor process was favored by defendants. Using more raw film, it was more profitable; and the immense capital outlays required for its costly equipment ruled out competition from small independents in the field (R. 30a-32a, 33a, 38a-39a; Pars. 42, 45, 53(g) and (h)).

The means employed by defendants to suppress the Keller-Dorian process and maintain the field exclusively for technicolor are a text book illustration of the methods of monopoly. As the initial step, Eastman acquired prime licensing rights and key laboratory equipment and know-how under Keller-Dorian patents, giving it a stranglehold on the commercial development of the process (R. 16a-18a, 28a-29a; Pars. 12-13, 41(g)).

Then, from this strategic position, instead of devoting its best efforts to making the process commercially available, as it was obligated to do, all of its efforts, in conspiracy with Technicolor, were aimed at sabotaging commercial use and discouraging public interest in the process (R. 27a-30a, 32a-33a; Pars. 41, 43, 44, 45). Overt acts in the conspiracy took many forms:

Manufacture and distribution of Keller-Dorian film was deliberately withheld while technicolor film was made readily available (R. 28a-30a, 34a; Pars. 41(f), (h), (i), (m), (n) and (o), 47). The limited quantities of Keller-Dorian film which were released were deliberately made defective and unusable (R. 29a-30a; Par. 41(k)). Showings of test motion pictures made with Keller-Dorian film that demonstrated its superiority were suppressed; and the motion picture industry was falsely advised that the Keller-Dorian process was unusable (R. 29a-30a; Par. 41(k)). While this was taking place, Eastman marshalled its vast research and laboratory facilities to improve the technicolor process and gain public acceptance for it (R. 33a-34a; Par. 46).

Parallel with these efforts, Eastman and Technicolor carefully laid plans to drain petitioner's commercial vitality —a matter easily accomplished, since petitioner was dependent under the interlocking licensing arrangements upon Eastman for its supply of raw film (R. 17a-19a, 26a, 37a; Pars. 13, 17-18, 37, 52).

They began by forming a rival American company known as Keller-Dorian Colorfilm Corporation (R. 20a-21a; Pars. 21, 23). This was followed with a harassing law suit and an arbitration proceeding which they conspired to have brought against Moviecolor (R. 21a-22a; Pars. 24, 25). The litigation coupled with Moviecolor's mounting financial concerns resulting from its inability to distribute Keller-Dorian film because of Eastman's failure to supply it, shortly ended in Moviecolor's falling under the domination and control of Eastman and Technicolor and being compelled to relinquish its rights in the Keller-Dorian process to the rival American company (R. 20a-21a, 22a, 24a, 26a, 37a; Pars. 22-24, 26, 30, 37-38, 52).

On November 3, 1939, Moviecolor, having been reduced to a state of helpless insolvency and legal incapacity, was dissolved and stricken from the Register of Companies of Great Britain (R. 26a; Pars. 38-39). On February 3, 1955, when the facts alleged in the complaint came to light, it was restored to the Register and a liquidator appointed over its affairs (R. 26a; Par. 39).

The foregoing brief and necessarily incomplete review of the complaint, is nevertheless sufficient to show that the wrongdoing charged is of such nature that it would have had to be concealed to be successful. The perpetrators could be relied on to go to any lengths to hide all clues to comprehension of their methods and their motives. We are not confronted here with the common type of antitrust violation in which the giant firm in the field seeks to

destroy or absorb competitors so that it may have a free hand in marketing a product. Here the giant destroyed or suppressed the product so that the market would be free for its inferior but more profitable substitute. This is a uniquely pernicious type of antitrust violation and one almost impossible for government authorities to remedy. For here, the crucial sabotage is accomplished in the inner recesses of the giant's research laboratories. Until the secrets leak out many years later, who can challenge the giant's terse communiques that the Keller-Dorian process is unsuitable and unusable?

Reason for Granting the Writ.

In summary, the reasons for granting the writ are:

1. This case presents an ideal opportunity for this Court to announce standards, which it has never done, for application of the requirement of Rule 15(a) that leave to amend pleadings "shall be freely given when justice so requires." The decisions of courts of appeals and district courts throughout the federal system are at variance and in conflict on the question. The Second Circuit in this case employed harsh and technical standards wholly at odds with the prevailing view that the just result ordinarily is achieved when pleadings are preserved for decisions on the merits. Rule 15(a) was never intended to be used by the courts, through narrow and restrictive application, as a means of expressing lack of confidence in a litigant's ultimate chances on the merits.

2. By granting the writ, this Court would also have the opportunity, if it so elects, to consider the holding of the Court of Appeals that federal equitable tolling doc-

trine applies in an action at law based on a federal right to the time period of a state statute of limitations. This is the last important question remaining unanswered by this Court in a problem that has recurred in one form or another for almost a hundred years since *Bailey* v. *Glover*, 88 U. S. 342, 21 Wall. 342 (1874); and is bound to recur.

I.

Certiorari should be granted to announce standards for application of Rule 15(a).

Rule 15(a) has been called "one of the most important of the rules that deal with pleadings," and a key provision for attaining the objective of the rules "that pleadings are not an end in themselves, but are only a means to the proper presentation of a case; that at all times they are to assist, not deter, the disposition of litigation on the merits." 3 *Moore's Federal Practice* 804.

While express standards governing application of Rule 15(a) have never been set down by this Court, this Court has stated its conception of pleadings as instrumentalities of the just decision on the merits. *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197, 200-1 (1938); *Conley* v. *Gibson*, 355 U. S. 41, 47-48, *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, 235 (1959).

To this end, pleadings serve mainly a "notice" function and the approach has been specifically rejected that "pleading is a game of skill in which one misstep by counsel may be decisive to the outcome. . . ." *Conley* v. *Gibson*, *supra*.

Glus v. *Brooklyn Eastern District Terminal*, *supra*, is particularly relevant because there this Court held that the time-honored doctrine of equitable estoppel could temper a statute-of-limitations defense; and a complaint that was "too vague" was no bar to a trial on the merits.

One of the rare cases in which Rule 15 has been mentioned by this Court is *Bryan* v. *Austin*, 354 U. S. 933 (1957), where in a *per curiam* opinion citing Rule 15 and nothing more, a cause that had become moot was remanded "with leave to the appellants to amend their pleadings either to safeguard any rights that may have accrued to them by virtue of the operation of the repealed act or to set forth a cause of action based on the operation of the new act." Unfortunately, the standards invoked by the Court in applying the Rule were not spelled out.

The courts below and authorities have been fulsome in their commentary on the need for breadth and generosity in the application of Rule 15. Thus, 3 *Moore's Federal Practice* 828, emphasizes that "the courts have shown 'a strong liberality . . . in allowing amendments under Rule 15(a)';" and "have not been hesitant to allow amendments for the purpose of presenting the real issues of the case. . . ."

In 1A Barron and Holtzoff, *Federal Practice and Procedure* 707, the authors go so far as to state:

> "Indeed it is perhaps no exaggeration to say that the only reason for not allowing an amendment to a pleading is prejudice to the opposing party."

While this type of language is repeated in the decisions*, standards have not been firmly fixed and conflicts and variations among the circuits and from case to case within circuits are becoming increasingly apparent.

---

* See, e.g.: *Tahir Erk* v. *Glenn L. Martin Co.*, 116 F. 2d 865 (4 Cir., 1941); *Robbins* v. *Jordan*, 181 F. 2d 793 (D. C. App. 1950); *Kerrigan's Estate* v. *Joseph E. Seagram & Sons*, 199 F. 2d 694 (3 Cir. 1952); *Huse* v. *Consolidated Freightways*, 227 F. 2d 425 (7 Cir. 1955); *International Ladies' Garment Workers Union* v. *Donnelly Garment Co.*, 121 F. 2d 561 (8 Cir. 1941); *Dombrovskis* v. *Murff*, 24 F. R. D. 302 (S. D. N. Y. 1959).

The Seventh Circuit is committed to the proposition that only prejudice to the opposing party is a ground for denying leave to amend. *Armstrong Cork Co.* v. *Patterson-Sargent Co.*, 10 F. R. D. 534 (N. D. Ohio, E. D., 1950), *A. L. B. Theatre Corp.* v. *Loew's Inc.*, 21 F. R. D. 584 (N. D. Ill. 584). In *McNaughton* v. *New York Central Railroad Company*, 220 F. 2d 835, 840 (7 Cir. 1955), that Court went so far as to state:

> ". . . no proposed amendment to a pleading should be denied unless it appears to a certainty that the moving party 'would not be entitled to any relief under any state of facts which could be proved in support of its claims'."

Other courts appear to be in accord, e.g., *Hirshorn* v. *Mine Safety Appliance Co.*, 101 F. Supp. 549, 552 (W. D. Pa. 1951) ("the primary question is whether or not the allowance of the amendment will work prejudice upon any of the parties"); *Tahir Erk* v. *Glenn L. Martin Co.*, 116 F. 2d 865 (4 Cir. 1941); *W. C. Shepherd Co.* v. *Royal Indemnity Co.*, 192 F. 2d 710 (5 Cir. 1951); *Archbold* v. *McLaughlin*, 181 F. Supp. 175 (D. C. 1960); *McDowall* v. *Orr Felt & Blanket Co.*, 146 F. 2d 136 (6 Cir. 1944).

In other circuits, however, prejudice has been coupled in the same breath with "delay," "bad faith," "lack of good excuse," and so on as grounds for withholding relief. *Gallon* v. *Lloyd-Thomas Company*, 264 F. 2d 828 (8 Cir., 1959); *Dombrovskis* v. *Murff*, 24 F. R. D. 302 (S. D. N. Y. 1959); 3 *Moore's Federal Practice* 828.

Delay has been specifically rejected in the Seventh Circuit as grounds for denying leave to amend. *A. L. B. Theatre Corp.* v. *Loew's Inc.*, 21 F. R. D. 584 (N. D. Ill. 584). It has been invoked, however, in the Eighth Circuit, *Frank Adam Electric Co.* v. *Westinghouse Elec. Mfg. Co.*, 146 F. 2d 165 (1945). In accord: *Schick* v. *Finch*, (S. D. N. Y. 1944)

8 F. R. D. 639; *Canister Co., Inc.* v. *National Can Corp.*, 6 F. R. D. 612 (Del. 1946).

Other conflicts could be cited. It is appropriate for this Court to speak out on the matter now. Uncommonly harsh and restrictive criteria were employed here by the Court of Appeals to block petitioner from seeking leave to amend. A thirty-year-old claim appears to be more than the court cared to countenance, and it used a rigid application of Rule 15(a) to express itself on the matter. It held in effect that petitioner had forfeited the right to seek leave to amend by failing to state in advance of seeking the leave how it proposed to amend. Petitioner, in short, was held obligated to propose a proposed amendment. In imposing this obligation, the Court of Appeals wholly overlooked the fact that the District Court had "assume(d) that the complaint raise(d) the question of fraudulent concealment" (R. 7a); and the appeal was prosecuted in this posture.

The court also implied that granting leave would somehow be unfair to defendants, stating that "defendants' interests are entitled to recognition" (*infra* p. 30). The fact is no prejudice could result to defendants and no "interests" of theirs are at stake. This case is at its inception. Except for several practice motions to determine priorities and other such details, discovery proceedings have barely begun and not a single deposition has been taken.

Moreover, there has not been a day's delay in proposing the amendment since until the court below rejected the District Court's ruling on the law any thought of amendment was academic. The fact that an amendment may make out a stronger case for petitioner is naturally not the sort of prejudice defendants can complain of. *Schwartz* v. *American Stores Co.*, 22 F. R. D. 38 (D. C. Pa. 1958).

II.

Certiorari should be granted so that this Court can end all uncertainty as to the application of federal equitable tolling doctrine to state statutes of limitations in suits based on federal rights.

In *Bailey* v. *Glover*, 88 U. S. 342 (1874), this Court held, in a suit based on a federal statute, that federal equitable tolling doctrine was applicable to a time limitation contained in the federal statute both in actions at law and in equity. There is no question that *Bailey* is still good law.

In *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), this Court held, in an action in equity based on a federal statute that did not have its own limitation period, that the question of limitation was governed by the federal equitable doctrine regardless of state law. There is no question that *Holmberg* is still good law.

We read *Holmberg*, as the Court of Appeals read it, to apply to all suits based on federally created rights whether at law or in equity, and whether the federal statute has its own internal time limitation or borrows a state limitation. This is, nevertheless, the first time, as the court below recognized (*infra* p. 21), that the issue has been "truly" determined, and the federal doctrine applied in obvious conflict with state law. Heretofore, whether by design or chance, the doctrine has apparently been invoked only where it appears to have been consistent with state law.

The courts of appeals and district courts have obviously found the problem troublesome. Where they invoke the doctrine they speak sometimes as if they were doing so under state law, sometimes under federal law, sometimes under an amalgam of both, and most of the time they appear

to have consciously avoided articulating exactly what they were doing. The problem raises important questions of the role of state law in the federal system in suits based on federal rights, and it is bound to recur.*

In the absence of a clarifying statement from this Court, the uncertainties and confusion in the issue, and the variations in approach of the different circuits, have trammeled up parties and courts in formalistic bickering as to whether an action is at law or in equity with plaintiffs contending the former and defendants the latter—the idea being that if the action is held to be equitable the rule of *Holmberg* will undoubtedly apply.

Typical is *Burnham Chemical Co.* v. *Borax Consolidated,* 170 F. 2d 569 (9 Cir. 1948), cert. den., 336 U. S. 924 (1949), rehearing den., 336 U. S. 955 (1949), a treble damage action under the antitrust laws, where the Ninth Circuit held California tolling doctrine applicable. *Cf. Sukow Borax Mines Cons.* v. *Borax Consolidated,* 185 F. 2d 196 (9 Cir. 1950), cert. den., 340 U. S. 943 (1951), rehearing den., 341 U. S. 912 (1951).

In *American Tobacco Co.* v. *People's Tobacco Co.,* 204 F. 58 (5 Cir. 1913), both federal and state cases were cited to support application of a fraudulent concealment tolling doctrine.

In *Tobacco and Allied Stocks, Inc.* v. *Transamerica,* 143 F. Supp. 323 (D. Del. 1956), aff'd, 244 F. 2d 902, 903 (3 Cir.

---

* The following federal causes of action listed in the NOTE, *Federal Statutes Without Limitation Provisions,* 53 Col. L. R. 68 (1953), n. 2, are still without limitation periods:

Actions under post Civil War civil rights legislation, 42 U. S. C. §1983.

Actions to enforce statutory liability of shareholders in insolvent joint-stock land banks, 12 U. S. C. §812.

Actions by receivers or trustees on behalf of bankrupt estates, 11 U. S. C. §29(e).

1957), the district court undercut conflicting contentions of the parties as to whether the action was at law or in equity by labelling it concurrently in both and holding that both state and federal law applied. On appeal, the Court of Appeals sought to circumvent all complications by assuming "without deciding" that the action was "exclusively equitable."

In *Crummer Co.* v. *DuPont*, 117 F. Supp. 870, 876, rev'd. on other grounds, 223 F. 2d 238, 148 F. Supp. 255, rev'd. on other grounds, 255 F. 2d 433 (5 Cir. 1958), the district court, citing *Bailey* v. *Glover*, held that there "*is no doubt*" that the "doctrine of fraudulent concealment applies in private civil antitrust actions." It attempted no elucidation, however, of whether variable state law would make any difference. On appeal, the Court of Appeals for the Fifth Circuit simply observed that the district court had entered an order finding that the "doctrine of fraudulent concealment applies. . . .".

An outright conflict existed in the Southern District of New York prior to the decision below. In *Winkler Koch Engineering Co.* v. *Universal Oil Products*, 100 F. Supp. 15 (S. D. N. Y. 1951), an antitrust action, the district court, without citing any authority but using the language of *Holmberg* and *Bailey*, held the limitation period of N. Y. C. P. A. §48 (2) subject to federal tolling doctrine. In the instant case, the district court reached the opposite result (R. 6a-10a).

This important and recurrent problem should be resolved once and for all by this Court.

Conclusion.

For the reasons stated, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

Cooper, Ostrin & De Varco,
Herman E. Cooper,
Eugene N. Sosnoff,
655 Madison Avenue,
New York 21, New York
Attorneys for Petitioner.

June 1, 1961.

Appendix A.

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 193—October Term, 1960.

(Argued January 19, 1961 Decided March 10, 1961.)

Docket No. 26470

MOVIECOLOR LIMITED,
Plaintiff-Appellant,

EASTMAN KODAK COMPANY, TECHNICOLOR, INC. and TECHNICOLOR MOTION PICTURE CORPORATION,
Defendants-Appellees.

Before:

MEDINA, FRIENDLY and SMITH,
Circuit Judges.

Plaintiff appeals from an order of the District Court for the Southern District of New York, David N. Edelstein, *J.*, dismissing its complaint under §4 of the Clayton Act as time barred. Affirmed.

EUGENE N. SOSNOFF, of COOPER, OSTRIN & DE VARCO, New York, N. Y. (HERMAN E. COOPER, EUGENE N. SOSNOFF and RONALD BROOKS, on the brief), for Plaintiff-Appellant.

Appendix A.

ROY W. MCDONALD (DONOVAN, LEISURE, NEWTON & IRVINE, New York, N. Y., NIXON, HARGRAVE, DEVANS & DEY, Rochester, N. Y.; ROY W. MCDONALD, ARTHUR L. STERN and THEODORE S. HOPE, on the brief), for Defendant Eastman Kodak Company.

GEORGE S. FLINT (Fulton, Walter & Duncombe, New York, N. Y.), for Defendants-Appellees Technicolor, Inc. and Technicolor Motion Picture Corporation.

FRIENDLY, Circuit Judge:

Plaintiff brought this action under §4 of the Clayton Act, 15 U. S. C. §15, in the Southern District of New York in 1959. It sought to recover treble damages for injuries from alleged violations of the antitrust laws by defendants in suppressing competition in the manufacture and sale of color still and motion pictures. Later we shall have to analyze the complaint in some detail; for the present it is enough that the complaint charged defendants with a series of illegal acts culminating in an agreement, dated October 22, 1931, by which plaintiff consented to the cancellation of a license from Société du Film en Couleurs Keller-Dorian (hereafter French Keller-Dorian) giving plaintiff the exclusive right to exploit the Keller-Dorian color process subject to certain rights of defendant Eastman Kodak Company and others under earlier agreements.

Since §4 of the Clayton Act contained no period of limitations in 1931, as it now does by virtue of the Act of July 7, 1955, c. 283, §1, 69 Stat. 282, 283, 15 U. S. C. §15b, reference must be made to New York law to determine the applicable period, here the six years provided by New York Civil Practice Act, §48-2, for an "action to recover upon a liability created by statute, except a penalty or forfeiture," *Bertha Building Corp.* v. *National Theatres Corp.*, 269 F. 2d 785, 789 (2 Cir. 1959), cert. denied, 361 U. S. 960 (1960).

Appendix A.

Plaintiff sought to avoid the time bar raised by defendant's motion for judgment on the pleadings, F. R. Civ. Proc. 12(c), by invoking what it contended to be an applicable federal rule that a defendant guilty of certain types of conduct which, for present purposes, we will describe as concealment of the wrong, will not be allowed to claim that a period of limitations has begun to run while the concealment continues. To this appellees countered, and the District Judge held, contrary to *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.*, 100 F. Supp. 15 (S. D. N. Y. 1951), that the federal concealment rule applies only when either Congress has specified its own period of limitation in creating a right as in *Bailey* v. *Glover*, 21 Wall. 342 (1875), or the action is to enforce a federally created right and is "in equity" as in *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946); and that hence the instant case is governed by the law of New York, which has no similar doctrine with respect to concealment save as specifically provided in §48-5 of the New York Civil Practice Act for actions "to procure a judgment on the ground of fraud," see *Austrian* v. *Williams*, 198 F. 2d 697, 700 (2 Cir. 1952), citing *Pollack* v. *Warner Bros. Pictures, Inc.*, 266 App. Div. 118, 120, 41 N. Y. S. 2d 225, 226 (1st Dept. 1943) and other cases; *Varga* v. *Credit-Suisse*, 5 A. D. 2d 289, 292, 171 N. Y. S. 2d 674, 677 (1st Dept. 1958), affd. 5 N. Y. 2d 865, 182 N. Y. S. 2d 17 (1958). We hold that the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act even when a state statute is used to measure the period; but we affirm on the ground that the complaint does not contain allegations sufficient to bring plaintiff within this federal rule. Although we could dispose of this appeal solely on the latter ground, we think it proper to deal also with the important question of law decided by the District Court, since the issue has been fully argued, the decisions in the Southern District are in conflict, and the problem is likely to recur.

Appendix A.

I.

Bailey v. *Glover, supra,* held that in an action to enforce a federally created right to recover for fraud, a federally established period of limitation does not begin to run until the fraud is discovered, whether the action was in equity, as it there was, or at law. Although that principle might have been limited to cases where the action itself sounded in fraud, it has not so been confined; *Holmberg* v. *Armbrecht, supra,* applied it to an action to collect a statutory liability imposed on stockholders of joint stock land banks, 12 U. S. C. §812, where the only "fraud" was concealment of the shareholders' identity, stating at p. 397, "This equitable doctrine is read into every federal statute of limitation."

It has also been long established that when Congress created a federal right but did not prescribe a period for its enforcement, Federal courts will borrow the period of limitation prescribed by the state where the court sits, *McCluny* v. *Silliman,* 3 Peters 270 (1830); *Campbell* v. *Haverhill,* 155 U. S. 610 (1895); *O'Sullivan* v. *Felix,* 233 U. S. 318 (1914). The basis of this was that Congress could not have intended an unlimited period for enforcement as would otherwise exist in actions at law, and that, selection of a period of years not being the kind of thing judges do, federal judges should borrow the limitation statutes of the states where they sit. Similarly, federal courts followed state statutes determining whether absence or disability should suspend the running of a statute of limitations and, if so, for how long, and the state court's interpretations of such statutes, not only in diversity actions, *Bauserman* v. *Blunt,* 147 U. S. 647 (1893), as *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938) later required, but also in actions to enforce a federally created claim, *Barney* v. *Oelrichs,* 138 U. S. 529 (1891). In dealing with federally created claims both federal and state law must sometimes be consulted to determine whether the borrowed period has run. Thus, when a

state has established different periods of limitation for different types of action, a federal court enforcing a federally created claim looks first to federal law to determine the nature of the claim and then to state court interpretations of the statutory catalogue to see where the claim fits into the state scheme. *McClaine* v. *Rankin*, 197 U. S. 154 (1905); *Bertha Building Corp.* v. *National Theatres Corp.*, *supra*, at 788-89. See *Chattanooga Foundry and Pipe Works* v. *Atlanta*, 203 U. S. 390 (1906). Similarly, a federal court will follow state decisions as to how far a cause of action must be "complete" to have "accrued" under state limitation statutes but will look to federal law to determine what needs be done to advance a federally created right to the level so required, *Rawlings* v. *Ray*, 312 U. S. 96 (1941); *Cope* v. *Anderson*, 331 U. S. 461 (1947); it will look also to state decisions to determine where the cause of action accrued, *Cope* v. *Anderson*, *supra*. State statutes and decisions of the sort described have been thus borrowed not only in actions at law but also in many types of suits in equity to enforce federally created claims, to such extent as the state law was applied in equity by the state courts, see *Russel* v. *Todd*, 309 U. S. 280, 290-94 (1940).

In sharp contrast to all this, *Holmberg* v. *Armbrecht*, *Holmberg: supra*, refused to apply the New York doctrine that concealment would not suspend the running of the statute in an action not founded on fraud, where the suit in the federal court was to enforce a federal right and was "in equity," although, unlike *Bailey* v. *Glover*, there was no federally established period of limitation. The question before us is whether the principle of *Holmberg* v. *Armbrecht* applies also in an action "at law" to enforce a federal right. Neither the parties' research, nor our own, has disclosed any decision truly determinative of that issue either by the Supreme Court or by a Court of Appeals, decisions of the latter applying a doctrine of concealment so as to extend state statutory periods in actions "at law" to enforce federally created rights without federally limitation apparently

being consistent with the law of the state where the court sat, *American Tobacco Co.* v. *People's Tobacco Co.*, 204 Fed. 58 (5 Cir. 1913); *Burnham Chemical Co.* v. *Borax Consolidated, Ltd.*, 170 F. 2d 569 (9 Cir. 1948), cert. denied 336 U. S 924 (1949), rehearing denied 336 U S. 955 (1949); *Suckow Borax Mines Cons., Inc.* v. *Borax Consolidated, Ltd.*, 185 F. 2d 196 (9 Cir. 1950), cert. denied 340 U. S. 943 (1951), rehearing denied 341 U. S. 912 (1951); *Crummer Co.* v. *DuPont*, 223 F. 2d 238 (5 Cir. 1955), 255 F. 2d 425 (5 Cir., 1958); *Tobacco & Allied Stocks, Inc.* v. *Transamerica Corp.*, 143 F. Supp. 323 (D. Del. 1956), affd. 244 F. 2d 902 (3 Cir. 1957).

In the last analysis, decision of that issue requires an attempt to divine a purpose of Congress on a subject where no purpose has been manifested, if, indeed, it was had. Plainly Congress did not deem complete nationwide uniformity of limitation essential in such cases, else it would have provided its own period, as, for the subject with which we are here concerned, it now has done, 15 U. S. C. §15b. But we still must endeavor to determine whether, on the narrower issue of the effect of the wrongdoer's concealment, Congress would have preferred uniformity among the federal courts with respect to the right it had created, a uniformity favorable to recoveries by plaintiffs, or uniformity as between the treatment of this right in federal courts and of rights of a related conceptual character in the courts of the state where the federal court sits.

We think the former, at least where, as here, the right not merely is federally created but is enforceable only in the federal courts. To speak of "uniformity" as between federal and state courts in such a case is somewhat of a misnomer, and it is hard to see what policy would be served by attempting to achieve it. It seems far more likely that Congress would have desired the federal suitor it was creating to have the benefit of the federal rule prolonging the period of suit during concealment by the wrongdoer. This is particularly so when, as under the Clayton Act, enforcement of the

right often serves not merely private but public ends.[1] In this area, as contrasted with diversity litigation, federal interests transcend those of the states; state limitation statutes and doctrines are utilized to effect federal, not state, policy; and there is no reason for borrowing a state doctrine when there is an established federal one. See 2 Moore, Federal Practice (2d ed.), p. 763.

Holmberg v. *Armbrecht, supra,* especially when read in the light of *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945), appears to go a considerable way toward this answer, despite certain language that might be read as confining the decision more narrowly. The *Guaranty Trust Co.* case decided that state rules of limitations, including the lack of effect of concealment, see 143 F. 2d 503, 521 (2 Cir. 1944), apply in a federal suit to enforce a state created right to the same extent as in the courts of the state, "whether the remedies be sought at law or may be had in equity," p. 112. Since that is so, not merely the decisive but a sufficient reason for the contrary result in *Holmberg* v. *Armbrecht* must have been, not that the suit was in equity, although it was natural that the Court should have stressed this, but that the right was federally created. In at least two places the opinion indicates this rather strongly. Thus, Mr. Justice Frankfurter said, at p. 395:

> "The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. See *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349-50, 351-52."

---

[1] The debates on the 1955 amendment of the Clayton Act to provide its own period of limitation for treble damage actions, 69 Stat. 283, include statements by Representative Celler, chairman of the House Judiciary Committee, in answer to a question by Representative Patman, that under existing law the period of limitation ran only from discovery and that the new statute would not change that. 101 Cong. Rec. 5129, 5130, 5133 (1955).

This seems quite as applicable to what would have been an action at law as to a suit in equity; indeed, the sentence follows immediately upon a reference to borrowing in "action at law." And, at p. 397, after stating that *Bailey* v. *Glover, supra,* "is read into every federal statute of limitation," the opinion goes on:

> "It would be too incongruous to confine a federal right within the bare terms of a State statute of limitation unrelieved by the settled federal equitable doctrine as to fraud, when even a federal statute in the same terms would be given the mitigating construction required by that doctrine."

Since *Bailey* v. *Glover, supra,* applied "at law" as well as "in equity," the incongruity would seem as great in one case as in the other.

Moreover, to insist on any such distinction as appellees urge would be a refusal adequately to recognize the merger of federal law and equity effected by F. R. Civ. Proc. 1[2] and the 1948 revision of §34 of the Judiciary Act, 28 U. S. C. §1652, whereby "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision" not merely in "trials at common law" as theretofore, but "in civil actions in the courts of the United States, in cases where they apply,"

---

[2] This is not inconsistent with the position, 2 Moore, Federal Practice, 753, that "the procedural union of law and equity does not preclude the utilization of whatever doctrine, legal or equitable, is applicable in the state court to determine whether the action is barred, provided the matter is substantive." Professor Moore is saying that in cases where adoption of state rules is called for it may still be necessary to analyze whether the federal action is at law or in equity in order to select the proper state rule. Here the issue is whether, with federal law and equity united, there is any basis for the federal court's applying in an action "at law" a state rule, applicable there both at law and in equity, which the federal court would not apply in an action equitable in nature.

the Revisers' Note stating the change was made "to clarify the meaning of the Rules of Decision Act in the light of the Federal Rules of Civil Procedure. Such Act has been held to apply to suits in equity." See *Mason* v. *United States*, 260 U. S. 545, 558-59 (1923). No distortion of language is required to read §1652 as meaning that state rules refusing to suspend the running of a period of limitations because of concealment need not be followed in any action to enforce a federally created right, whether on the ground that the Act of Congress establishing the right impliedly "otherwise require(s) or provide(s)," exactly as when Congress has established its own period of limitation, or on the ground that state rules do not "apply" in actions to enforce federally created rights as against an established contrary federal decisional rule. On the other hand, to go beyond this and dichotomize actions to enforce federally created rights which do not carry their own period of limitations as between those formerly "at law" and those "in equity," would demand not only major linguistic surgery but also disregard of the declared purpose of the 1948 amendment. See Note, Federal Statutes Without Limitations Provisions, 53 Colum. L. Rev. 68, 71-72, 73-74 (1953).[3]

II.

We are therefore obliged to examine the question, not reached by the District Court under its view of the law, whether the complaint brings plaintiff within the federal concealment rule. Its principal allegations are as follows:

---

[3] To such extent as the alternative ground for decision in *Andreae* v. *Redfield*, 98 U. S. 225, 235-238 (1879), would indicate a result contrary to that here reached, we regard it as inconsistent with the quoted language in *Holmberg* v. *Armbrecht*, *supra*. The *Andreae* case was not cited by any of the three courts that considered *Holmberg* v. *Armbrecht*, nor was it mentioned in the briefs in the Supreme Court.

Our holding also runs counter to a dictum, although not to the decision, in *McCluny* v. *Silliman*, 3 Peters 270, 277 (1830).

Appendix A.

The Keller-Dorian process for producing color photographs was developed by French Keller-Dorian during the 1920's. Defendant Eastman Kodak Company, hereafter Kodak, was granted rights to exploit the process, certain of these being exclusive world-wide, others exclusive in the United States, Great Britain, Canada and Australia, and still others non-exclusive in these countries. Kodak also agreed to furnish French Keller-Dorian and its assigns and licensees with 35 millimeter film in countries where Kodak possessed such manufacturing rights, at a reasonable price. Thereafter Kodak began to use a different "Kodacolor" process and later the "Kodachrome" process. In 1929 French Keller-Dorian granted to plaintiff, a British corporation, the exclusive right to exploit its process world-wide subject to Kodak's rights and a few other preexisting arrangements; French Keller-Dorian also assigned to plaintiff Kodak's agreement to furnish film. In reliance on this, plaintiff entered into a contract to supply a company called Blattner with raw stock and apparatus produced under the process. Defendants, "separately or in concert, conspired to and effected" the organization of a Delaware corporation, hereafter American Keller-Dorian, and induced French Keller-Dorian to assign to American Keller-Dorian all its patent rights and its rights under the contract with Kodak. This was done in order to deprive plaintiff of the benefits of plaintiff's contracts with French Keller-Dorian and Blattner and to obtain control of the process with the intention of supressing it. Then defendants, "separately or in concert," fomented disputes between plaintiff and French Keller-Dorian, and defendant Technicolor sued plaintiff with respect to the Blattner license. As a result, plaintiff was "wrongfully required and caused" to enter into an agreement, dated May 23, 1930, with French Keller-Dorian "providing for the cancellation of the license of January 31, 1929 to the Keller-Dorian processes and further providing for the acquisition of control of plaintiff by defendants • • • " This agreement "was also caused by

defendants to provide" for an arbitration between plaintiff and French Keller-Dorian respecting the validity of the cancellation. As to this, plaintiff was "wrongfully induced" to waive the rights conferred by the 1929 agreement to arbitrate in England and instead to submit the validity of the cancellation to arbitration in France and under French law. The complaint does not say what the French arbitration determined, save as we may infer this from the foregoing and an allegation that the effect of all this was to deprive plaintiff of its rights in the Keller-Dorian process "by the domination and control over plaintiff wrongfully obtained by defendants." Then American Keller-Dorian granted to Paramount Publix Corporation exclusive rights to the process, saving Kodak's rights; simultaneously Paramount assigned its rights to Kodak, and the two companies agreed to work together in exploiting the process, Kodak to make the film and Paramount to take pictures and print them. Finally defendants "separately or in concert • • • wrongfully caused and induced" plaintiff to sign a contract, dated October 22, 1931, agreeing to the cancellation of its license and assigning all its rights to American Keller-Dorian. In 1939 plaintiff was forced to dissolve because of insolvency. Meanwhile defendants worked together to exploit other color processes and to suppress the Keller-Dorian process. In 1948 American Keller-Dorian sued defendants in the Southern District of New York, Kodak being charged with breach of contract and all three defendants with antitrust violations and conspiracy; these actions were settled by a large cash payment from Kodak and a license whereby American Keller-Dorian would receive certain royalties. In 1955 plaintiff's capacity was restored by judicial decree under the Companies Act and a liquidator appointed.

The gist of the complaint thus is that plaintiff had valuable rights to exploit a process for color photography; that defendants conspired to deprive plaintiff of these rights, to acquire control of the process, and to suppress

it; and that, to accomplish these ends, defendants forced plaintiff to sign away its rights, at first preliminary and subject to a French arbitration in 1930, and finally in 1931, with the result that plaintiff became insolvent and was dissolved in 1939.

Although the complaint liberally uses the adverb "fraudulently" as to defendant's conduct, such allegations are not enough to make out a case of concealment. The complaint is inconsistent with any view either that plaintiff did not know of its injury in signing away its rights to the Keller-Dorian process, see Developments in the Law—Statutes of Limitations, 63 Harv. L. Rev. 1177, 1221 (1950), or that it did not know of the actions of the defendants and of French and American Keller-Dorian that led up to that. The case is thus quite unlike those in which a defendant has concealed the transaction sued upon, *Bailey* v. *Glover, supra; Rosenthal* v. *Walker,* 111 U. S. 185 (1884), or the facts rendering a known transaction actionable, *Traer* v. *Clews,* 115 U. S. 528 (1885); *Exploration Co.* v. *United States,* 247 U. S. 435 (1918); *United States* v. *Diamond Coal & Coke Co.,* 255 U. S. 323 (1921), or his own identity, *Holmberg* v. *Armbrecht; supra.* Mere ignorance of evidence on which to establish a claim is not enough, even if the complaint here could be read as alleging that. *Tinkoff* v. *United States,* 211 F. 2d 890 (7 Cir. 1954); Dawson, Fraudulent Concealment and Statutes of Limitation, 31 Mich. L. Rev. 875, 916 (1933). Even if no affirmative act of concealment is required in restraint of trade conspiracy cases, see Dawson, *supra,* at 880, 907-08; *American Tobacco Co.* v. *People's Tobacco Co., supra,* cf. 63 Harv. L. Rev. at 1221, in contrast to the usual rule where there is no fiduciary relationship, a point we do not decide, there is no allegation that plaintiff did not know in the late 1920's and early 1930's whatever the facts were as to joint action by defendants. Viewed with the benevolence proper on a motion under F. R. Civ. Proc. 12(c), the complaint does not make out, indeed it rather negatives, concealment, *Suckow Borax*

Appendix A.

Mines Consolidated Inc. v. *Borax Consolidated Ltd., supra;* we do not read *Crummer* v. *DuPont, supra,* as pointing to a contrary result.

A further word is needed as to one allegation, namely, that the May 23, 1930 agreement provided "for the acquisition of control of plaintiff by defendants through French Keller-Dorian and/or American Keller-Dorian, and others" and that plaintiff's injury "resulted from and was caused by the domination and control over plaintiff wrongfully obtained by defendants." If the complaint adequately alleged that defendants had acquired management control of plaintiff in May, 1930, so that plaintiff thereafter was acting in defendants' interest rather than for all its stockholders, the case would come within another exception suspending the statute during the period of such adverse domination—an exception which, though sometimes bulked with concealment, in fact rests on grounds akin to undue influence or duress. *Allen* v. *Leflore County,* 78 Miss. 671, 29 So. 161 (1900); *Aldrich* v. *Steen,* 71 Neb. 33, 98 N. W. 445 (1904); *Alexander* v. *Thompson,* 195 Fed. 31 (6 Cir. 1912). See Dawson, Undiscovered Fraud and Statutes of Limitation, 31 Mich. L. Rev. 591, 615-16 (1933); 63 Harv. L. Rev. at 1219; Annot. 121 A. L. R. 1294 (1939). However, the complaint falls far short of this; there is no allegation that in fact "control" was ever acquired—unless this means simply a mere enfeebling of plaintiff by the very acts alleged to constitute the wrong, cf. *Martina Theatre Corp.* v. *Schine Chain Theatres, Inc.,* 278 F. 2d 798, 802 (2 Cir. 1960)—or that "control" of any sort lasted beyond the 1931 assignment, still eight years before plaintiff was dissolved.

Plaintiff urges that if we regard the complaint as insufficient to bring its case within *Bailey* v. *Glover,* we should state that affirmance is without prejudice to the District Court's entertaining an application to amend. We have power to do that even at this late stage. See 3 Moore, Federal Practice (2d ed.) §15.11, and we are cognizant of

the mandate of F. R. Civ. Proc. 15(a) that leave to amend "shall be freely given when justice so requires," although surely the freedom must diminish as the litigation progresses. The test laid down by Rule 15(a) has not been met here. Plaintiff must have realized from the outset that a complaint alleging a claim based on transactions nearly thirty years past would be confronted with a motion raising the statute of limitations; we have no doubt that plaintiff's experienced counsel drew the best complaint to meet such a motion that the facts warranted. Yet the complaint not only does not allege concealment but substantially negates it; and although the insufficiency of the complaint in this respect was sharply raised in Technicolor's brief, plaintiff has given no indication what amendment could be made. The case thus differs *toto caelo* from *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231, 235, see 232, fn. 2 (1959), which plaintiff cites. Where the transactions in suit are as remote as here and "it is above the remembrance of any living man truly to try and know the perfect certainty of such things," 32 Henry VIII, c. 2 (1540), the policy of the statute of limitations has peculiar force. Even under modern liberal rules of pleading "justice" still requires that a plaintiff seeking to escape the statute in such a case shall make "distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether by the exercise of ordinary diligence, the discovery might not have been before made." *Stearns* v. *Page*, 7 How. 819, 829 (1849). That has not been done, we are not told how it could be, the plaintiff's own allegations strongly suggest it could not, and defendants' interests are entitled to recognition as well as plaintiff's. *Voliva* v. *Bennett*, 201 F. 2d 434 (5 Cir. 1953).

Affirmed.